

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs March 14, 2006

JEFFREY L. GILLS v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 98-D-2428 Cheryl Blackburn, Judge

No. M2005-01218-CCA-R3-PC - Filed May 8, 2006

A Davidson County jury convicted the Petitioner of facilitation of first degree murder, two counts of facilitation of attempted first degree murder, two counts of aggravated assault, and felony reckless endangerment. The trial court sentenced the Petitioner to fifty-one years in prison, and this Court affirmed the Petitioner's convictions and sentences on appeal. State v. Frank E. Huey, Ronnie Finch & Jeffrey L. Gills, No. M2000-02793-CCA-R3-CD, 2002 WL 517132, at *1 (Tenn. Crim. App., at Nashville, Apr. 5, 2002), *perm. app. denied* (Tenn. Oct. 14, 2002). Subsequently, the Petitioner filed a petition for post-conviction relief, alleging that he received the ineffective assistance of counsel. After a hearing, the post-conviction court dismissed the petition, and the Petitioner now appeals alleging that the post-conviction court erred. Finding no reversible error, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Ronald Munkeboe, Jr., Nashville, Tennessee, for the Appellant, Jeffrey L. Gills.

Paul G. Summers, Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Facts on Direct Appeal

As set forth in our Court's opinion on direct appeal, the proof at the Petitioner's trial established the following facts:

On May 5, 1998, Jerome Jones was standing on the sidewalk outside his

home at 357 Settle Court in Nashville, when Defendant Finch rode by on his bicycle and demanded that Mr. Jones move out of his way. The two argued for several minutes. Mr. Jones testified that during that afternoon he saw Defendant Finch several times outside of his apartment with a gun in his hand. On May 6, Mr. Jones was watching television in his bedroom when he heard a knock on the apartment door. As he entered the living room, he saw the three Defendants. The Defendants wanted to discuss the events of May 5, and Mr. Jones asked them to accompany him to his bedroom because his girlfriend and her children were in the living room. Defendants Huey and Finch accompanied Mr. Jones into the bedroom where Defendant Huey struck Mr. Jones on the head with a pistol, put the gun to his face, and ordered him outside. As Defendant Huey led Mr. Jones into the living room at gunpoint, Michael White, Mr. Jones' cousin, entered the home. Defendant Huey pointed the gun at Mr. White and then walked out of the house. Once outside the house, Defendant Huey fired once into the air. After Defendant Huey's departure, Defendants Gills and Finch left through the back door.

After the altercation, Mr. Jones left the Settle Court area with Harold Blair, who promised to provide Mr. Jones with a firearm for his protection. Word of the altercation between Mr. Jones and the Defendants quickly spread, and, when Mr. Jones returned to his home that evening, two of his uncles, Ben and Leo White, were waiting. Leo White had a firearm in the trunk of his car that he intended to give Mr. Jones.

As Mr. Jones talked with his uncles, Mr. Blair walked toward Mr. Jones' home where Sharon Sanders, Mr. Jones' girlfriend, and her children stood. While Leo White was opening his trunk, gunfire erupted. Leo White was shot once in the leg. Ben White was shot once in the groin and once in the leg. Medical Examiner Dr. Bruce Levy testified at trial that Ben White bled to death as a result of the two gunshot wounds.

Mr. Jones testified at trial that he, Ben White, and Leo White were all unarmed at the time of the attack, and that the gun in Leo White's trunk was never removed. Mr. Jones also testified that he did not see the attackers. According to Mr. Jones, the shooting lasted for approximately thirty seconds and there were numerous shots fired. Sherry Stevens, Mr. Jones' aunt, testified that she was aware of the altercation at Mr. Jones' home. Ms. Stevens observed Defendant Gills walking up the street toward Mr. Jones' apartment just prior to the shooting. She also stated that she saw Defendants Huey and Finch coming around the corner of the apartment building at the same time. Ms. Stevens saw Defendant Gills raise a pistol and open fire in the direction of Mr. Jones. Ms. Stevens was unsure whether Defendants Huey and Finch were also armed.

Christopher Works also witnessed the shooting and testified that he saw

Defendant Gills standing in the middle of the street and Defendant Huey at the side of the apartment building with a rifle just prior to the time the shooting began. Mr. Works further stated that he did not see any weapons among the group of people standing on and around Mr. Jones' porch, nor did he see Mr. Jones, Ben White, or Leo White with a weapon. Mr. Works' mother, Janice Goff, also testified that from her front porch she saw Defendant Huey fire a rifle in the direction of Mr. Jones' apartment. She testified that she heard many guns being fired, but did not see anyone around Mr. Jones' apartment returning fire.

Sharon Sanders, Mr. Jones' girlfriend, was sitting on her porch when the shooting started. She testified that she saw Defendant Gills in the street pointing a gun at her apartment. She then saw Gills open fire. Ms. Sanders stated that she, Michael White's wife, and several children were all on or around the porch when the shooting started.

Detective Matt Pilcus of the Metro Police Department testified that he was the first officer to arrive on the scene, and he immediately rendered aid to Ben White. Upon arrival Detective Pilcus stopped a blue truck from leaving the scene, but his attention was diverted to Mr. White before he could question the driver. When he returned later, the truck was empty and locked. Detective Pilcus testified that he did not see any weapons in the vicinity of the victims, Leo and Ben White. Crime Scene Investigator Marsha Brown testified that eight 9 millimeter shell casings, one .45 caliber shell casing and one projectile were found in front of Mr. Jones' apartment. At the corner of the apartment building where Defendant Huey had been seen, fourteen 9 millimeter shell casings, two projectiles and three rifle casings were found. One rifle bullet was recovered from Ben White's body at Vanderbilt Hospital shortly before he died.

Tennessee Bureau of Investigation ballistics expert Steve Scott examined the shell casings found at the scene and determined that several different 9 millimeter pistols and at least one Chinese SKS or Russian AK47 assault rifle were used during the shooting. Mr. Scott testified that as many as eleven and as few as eight guns were used during the shooting.

Defendant Finch contended at trial that he was either not present or was present but did not fire a gun. Defendants Gills and Huey contended at trial that they acted in self-defense or, alternatively, that the shooting was mutual combat. Specifically, Defendants Gills and Huey contended that they did not initiate the gunfight.

Harold Blair testified for Defendant Huey at trial. Mr. Blair stated that he and Mr. Jones were drug dealers, and that he was armed on the night of the shooting. Mr. Blair testified that just prior to the shooting one of Mr. Jones' uncles took a shotgun

out of the trunk of a car and cocked it. Mr. Blair observed Defendants Huey and Finch come around the corner of a building with Defendant Huey carrying a rifle. Mr. Blair also saw Defendant Gills in the street with a pistol. According to Mr. Blair, Defendants Huey and Gills opened fire, however, he was unsure whether Defendant Finch had a weapon. Mr. Blair returned fire. Mr. Blair testified that the day after the shooting his apartment was searched by police officers. Drugs and two guns were recovered. Mr. Blair stated that one of the guns was a Chinese SKS or Russian AK47 rifle.

Phillip Bradford, Mr. Jones' upstairs neighbor, also testified for the Defendants and stated that immediately after the shooting he observed four black males running around the back of the building firing guns into the air. Mr. Bradford also stated that he saw several men loading weapons into a blue car in the front of the building. Mr. Bradford's sister-in-law, Michelle Taylor, also lived above Mr. Jones and testified that she saw four armed men fleeing the area after the shooting. She identified Defendants Gills and Finch as two of those four men. Ms. Taylor further stated that after the shooting she saw a woman with long braids come out of the apartment below her, throw a gun into a blue car, and then run back into the apartment.

State v. Frank E. Huey, Ronnie Finch & Jeffrey L. Gills, No. M2000-02793-CCA-R3-CD, 2002 WL 517132, at *1-3 (Tenn. Crim. App., at Nashville, Apr. 5, 2002), *perm. app. denied* (Tenn. Oct. 14, 2002). In that opinion on direct appeal, this Court affirmed the Petitioner's convictions and sentences.

B. Post Conviction Facts

The Petitioner timely filed a petition for post-conviction relief, and the post-conviction court appointed counsel for the Petitioner. At a hearing on the Petitioner's petition for post-conviction relief, the following evidence was presented: the Petitioner testified that his trial counsel ("Counsel") was not his original attorney but was appointed to represent him at his arraignment. The Petitioner agreed that Counsel came to see him in jail between five and seven times during the year and a half to two year time period between the time that Counsel was appointed and the Petitioner's trial, and the visits each lasted between ten and twenty minutes. The Petitioner recalled that sometimes Counsel would come to see him alone, and other times he brought law students with him. He said that there were other times when the law students would come to see him alone, without Counsel, and the students seemed like they did not know anything.

The Petitioner said that during Counsel's visits the Petitioner expressed his desire to testify about three to five times. The Petitioner testified that Counsel never answered him and, one time, told him to "hold up" because Counsel was trying to get his case together. He said that Counsel did not give him a reason that he should not testify and did not tell him about any strategy or defense. The Petitioner agreed that he had signed a waiver of his right to testify at trial but said that he did

so because he trusted Counsel. The Petitioner told Counsel that he wanted a speedy trial because he wanted to catch the district attorney off-guard and unprepared.

The Petitioner agreed that the only two witnesses at his preliminary hearing were Detective Mann and Jerome Jones, and he agreed that Detective Mann did not testify at his trial. The Petitioner noticed in the discovery materials that he received that there were two witnesses, Stephens and Sanders, who were not able to identify the Petitioner in a photographic lineup. He mentioned this to Counsel, and Counsel said that he was going to check into this matter. The Petitioner said that these two witnesses later identified the Petitioner, and the Petitioner pointed out the inconsistencies to Counsel. The Petitioner said that, despite these inconsistencies, Counsel did not interview Stephens or Sanders.

The Petitioner said that there was an issue at his trial about a possible mistrial. He said that during the course of the trial some ballistic evidence was missing, and he asked Counsel to make a motion for a mistrial, but Counsel did not. The Petitioner said that Counsel told him that the Petitioner did not want a mistrial because a mistrial would just leave him sitting in jail for two more years before another trial.

The Petitioner testified that Counsel presented no evidence at his sentencing hearing. He told Counsel that his mother, father, and pastor were all willing to testify on his behalf, but Counsel did not call any of them.

On cross-examination, the State asked the Petitioner what he would have said if he was allowed to testify at his trial, and he responded that he could not answer that question because it could be used against him if he got a new trial. The post-conviction court informed the Petitioner that it must know what his testimony would have been to determine if some error had been committed, but the Petitioner still refused to answer the question.

The Petitioner said that he did not know what the trial strategy was going to be before the trial. At the trial, he heard Counsel argue that the victim fired a gun at the Petitioner first, and he just fired back. The Petitioner agreed that an investigator working with Counsel also came to see him in jail, and they talked about the Petitioner's case.

With regard to the witnesses that the Petitioner wanted called at his sentencing hearing, the Petitioner said that he could not testify about what they would have said at the sentencing hearing. He admitted that they were not present at the post-conviction hearing to testify.

The Petitioner agreed that he signed a waiver of the right to testify during his trial. He said that he did not know very much about the law then, and he trusted that his attorney would have advised him about the importance of testifying. The Petitioner said that, rather, Counsel told him to sign this document as "standard procedure." He said that the judge asked him if he had gone over the document with his attorney, and he said that he had. He did not recall whether the judge asked him if he understood that it was his decision whether to testify.

Counsel testified that he represented the Petitioner on several matters including the case that was the subject of the current post-conviction petition. He agreed that he represented the Petitioner starting at the Petitioner's arraignment. He said that he met with the Petitioner by himself and with other people, including law clerks and the investigator. Counsel was unsure of how many times he met with the Petitioner, but he said that they met a "sufficient number of times" for Counsel to understand the facts of the case and the leads that needed to be pursued. Counsel did not recall whether the Petitioner said that he wanted to testify on his own behalf, but he said that, while the decision to testify is always his client's choice, he probably advised against it in this case as a matter of trial strategy.

Counsel said that, during the State's case at trial, there was some missing ballistics evidence. The evidence was not disclosed to Counsel until during the trial. Counsel said that he did not know if anyone made a motion for a mistrial, but he remembered that they decided to proceed. Counsel made the decision that it would be a better strategy to argue that the State did not produce this evidence until the middle of the trial and that the State could not even show what gun it came from.

Counsel said that he did not recall whether the two witnesses, Stephens and Sanders, had problems identifying the Petitioner. About sentencing, Counsel said that he did not attempt to call anyone on the Petitioner's behalf because he did not believe that their testimony would have satisfied any of the mitigating factors.

Based on the foregoing evidence, the post-conviction court dismissed the Petitioner's petition for post conviction relief.

II. Analysis

On appeal, the Petitioner contends that the post conviction-court erred when it dismissed his petition because Counsel was ineffective. Specifically, the Petitioner alleges that Counsel was ineffective because he failed to: (1) adequately consult with the Petitioner and prepare a defense; (2) properly impeach the State's witnesses' testimony; (3) properly move for a mistrial; (4) allow the Petitioner to testify on his own behalf; and (5) present any evidence at the sentencing hearing. The State counters that Counsel's representation was well within the range of competence required of attorneys in criminal cases.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. Tenn. Code Ann. § 40-30-103 (2003). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2003). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999); Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court;

however, we must accord these factual findings a presumption of correctness, which is overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. Id. at 457. The Tennessee Supreme Court has held that the issue of ineffective assistance of counsel is a mixed question of law and fact and, as such, is subject to de novo review. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. State v. White, 114 S.W.3d 469, 475 (Tenn. 2003); Burns, 6 S.W.3d at 461; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). This right to representation includes the right to "reasonably effective" assistance. Burns, 6 S.W.3d at 461. The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the Petitioner must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the Petitioner by the Sixth Amendment. Second, the Petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the Petitioner of a fair trial, a trial whose result is reliable. Unless a petitioner makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Melson, 772 S.W.2d 417, 419 (Tenn. 1989). In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Strickland v. Washington, 466 U.S. 688 (1984)). When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988).

The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. Strickland, 466 U.S. at 690; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794 (1987) (quoting United States v. Cronin, 466 U.S. 648, 665, n.38

(1984)).

Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. House, 44 S.W.3d at 515 (citation omitted); Thomas Brandon Booker v. State, No. W2003- 00961-CCA-R3-PC, 2004 WL 587644, at *4 (Tenn. Crim. App., at Jackson, Mar. 24, 2004), *perm. app. denied* (Tenn. Jun. 21, 2004). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. House, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the Strickland test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Nichols v. State, 90 S.W.3d 576, 587 (Tenn. 2002). To satisfy the requirement of prejudice, a petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding the petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Id. at 694; see also Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

A. Counsel's Communication with Petitioner

The Petitioner alleges that Counsel failed to meet with him an adequate number of times to discuss the case with him, which left him uninformed as to the facts of his case. Further, he alleges that Counsel's actions prejudiced him. The State counters that the Petitioner has failed to show that Counsel was ineffective or that the Petitioner was prejudiced. The post-conviction court accredited Counsel's testimony and found that Counsel provided the Petitioner with effective representation. The post-conviction court further found that, even assuming that Counsel had only met with the Petitioner five to seven times, the Petitioner still failed to show that the number of meetings he had with Counsel was so deficient as to constitute ineffective assistance of counsel.

The evidence in the record does not preponderate against the findings of the post-conviction court. The record reflects that Counsel met with the Petitioner a sufficient number of times for Counsel to understand the facts of the case. Counsel also enlisted the services of an investigator who examined and investigated the Petitioner's case. Nothing in the record suggests that the Petitioner either received the ineffective assistance of counsel or was prejudiced by Counsel's representation. The Petitioner is not entitled to relief on this issue.

B. Witnesses' Testimony

The Petitioner contends that he was denied his constitutional right to present a defense because, even though he informed Counsel of alleged inconsistencies in witnesses' testimony,

Counsel made no independent investigation into the matter. He asserts that Counsel did not adequately cross-examine two witnesses about their alleged inability to initially identify the Petitioner in a photographic lineup. The State counters that there is no proof in the record that any such “initial” photographic lineup ever took place. Further, the State asserts that the Petitioner agrees that these witnesses both identified him in subsequent lineups, and he, therefore, cannot prove that the outcome would have been different had Counsel cross-examined these witnesses about an initial lineup.

The post-conviction court noted that the Petitioner failed to offer any evidence, besides his bare allegation, challenging the witnesses’ credibility. It concluded, therefore, that the Petitioner had not established that he received the ineffective assistance of counsel in this regard. The record does not preponderate against the post-conviction court’s finding. While the Petitioner asserted that two witnesses were unable to identify him in an initial photographic lineup, he did not question Counsel about this, provide a copy of the lineup, call and question the police officers present at such lineup, or call either of the two witnesses who allegedly could not identify the Petitioner. Under these circumstances, we conclude that the Petitioner has failed to prove that Counsel was ineffective or that the Petitioner was prejudiced. Therefore, the Petitioner is not entitled to relief on this issue.

C. Motion For a Mistrial

The Petitioner next asserts that Counsel was ineffective because he did not move for a mistrial or a continuance after he learned of potentially exculpatory ballistics evidence during the trial. The State counters that Counsel’s decision was a strategic one and that the Petitioner failed to prove that this evidence would have been exculpatory. The post-conviction court found that it was “undisputed that in the midst of trial it was discovered that a projectile removed from the victim during autopsy had been misplaced.” The court noted that it offered the defense an opportunity to have the bullet inspected, but, instead, the parties agreed to stipulate that the recovered projectile had been kept in the property room and never sent for testing. The post-conviction court accredited Counsel’s testimony that he thought that it was not in the Petitioner’s best interest to move for a mistrial or a continuance. Further, it noted that the Petitioner had still not requested that the bullet be sent for testing and could therefore not prove that he was prejudiced.

We conclude that the evidence does not preponderate against the post-conviction court’s findings. We agree that Counsel’s decision not to request a motion for a mistrial was one of trial strategy. He testified that he thought that it would be a better strategy to argue that the State did not produce this evidence until the middle of the trial and that the State could not even show what gun the bullet came from. As we previously stated, Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams, 599 S.W.2d at 279-80. The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. House, 44 S.W.3d at 515 (citation omitted). In this case we conclude that Counsel was not ineffective by not filing a motion for a mistrial but rather arguing that the State had failed to produce or adequately test the ballistic evidence. Further, the Petitioner cannot prove prejudice. He did not provide any evidence at the post-conviction hearing that would show that further testing of this bullet would have resulted in any

evidence favorable to him. Accordingly, the Petitioner is not entitled to relief on this issue.

D. Decision to Testify

The Petitioner next contends that Counsel was ineffective because he ignored the Petitioner's repeated requests to testify. The State asserts that Counsel was not ineffective and that the Petitioner failed to prove prejudice because he refused to tell the post-conviction court what his testimony would have been had he been allowed to testify. The post-conviction court found:

At trial, the Court . . . thoroughly informed [the] Petitioner that it was his sole choice whether to testify. After the Court questioned [the] Petitioner whether he discussed his right to testify with [C]ounsel and if he wished to waive his right, [the] Petitioner responded that he did in fact want to waive his right to testify and signed a "Waiver of Right to Testify," which was admitted at the evidentiary hearing as Exhibit 1. Accordingly, [the] Petitioner has failed to demonstrate by clear and convincing evidence that trial counsel was ineffective and prevented [the] Petitioner from testifying []or has he demonstrated he was prejudiced by any alleged deficiency.

Counsel testified that he did not recall whether the Petitioner said that he wanted to testify on his own behalf, but he probably advised against it as a matter of trial strategy. Further, the evidence does not preponderate against the post-conviction court's finding that, at trial, the court asked the Petitioner whether he had discussed his right to testify with Counsel and whether he wished to waive this right. After that discussion, the Petitioner responded that he wanted to waive his right to testify, signed a waiver of that right, and a copy of that document is included in the record on appeal. The Petitioner agreed at the post-conviction hearing that he told the trial judge that he had gone over this document with his attorney. We conclude that this evidence does not preponderate against the post-conviction court's finding that Counsel was not ineffective in this regard.

Further, the Petitioner has clearly failed to prove prejudice. At the post-conviction hearing, the Petitioner refused to state what his testimony would have been had he testified at trial. The State asked the Petitioner what he would have said if he was allowed to testify at his trial, and he responded that he could not answer that question because it could be used against him if he got a new trial. The post-conviction court informed the Petitioner that it must know what his testimony would have been to determine if some error had been committed, but the Petitioner still refused to answer the question. Without any proof about what the Petitioner's proposed testimony would have been, he cannot prove that he was prejudiced by not testifying on his own behalf. Accordingly, the Petitioner is not entitled to relief on this issue.

E. Counsel's Representation at the Sentencing Hearing

Finally, the Petitioner contends that Counsel was ineffective because he made no effort to put on proof at his sentencing hearing. The Petitioner states that Counsel was aware that there were some family members who would have testified on the Petitioner's behalf, but Counsel did not call

those witnesses on the Petitioner's behalf. The State counters that Counsel determined that there were no applicable mitigating factors and determined that any testimony from family members would not have been helpful. Further, the State notes that none of the family members testified at the post-conviction hearing; therefore, the Petitioner has not proven how he was prejudiced.

We conclude that Counsel's decision not to call additional witnesses at the sentencing hearing was not unreasonable. The Petitioner did not present proof at the post-conviction hearing regarding what further evidence additional witnesses would have provided. Such proof would be required to prove his claim of ineffective assistance of counsel. See John C. Johnson v. State, No. M2004-02675-CCA-R3-CO, 2006 WL 721300, at *15 (Tenn. Crim. App., at Nashville, Mar. 22, 2006). We further conclude that the petitioner has failed to demonstrate how he was prejudiced by his relatives and pastor not testifying at his sentencing hearing. Therefore, the Petitioner is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing authorities and reasoning, the judgement of the post-conviction court is affirmed.

ROBERT W. WEDEMEYER, JUDGE